90-38

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

DANIEL L. MEDLOCK, COMMUNITY COMMUNICATIONS COMPANY AND THE ARKANSAS CABLE TELEVISION ASSOCIATION, INC., ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED TAXPAYERS
PETITIONERS

v.

JAMES C. PLEDGER, COMMISSIONER OF REVENUES; JIMMIE LOU FISHER, TREASURER OF THE STATE OF ARKANSAS; DONALD VENHAUS, COUNTY JUDGE, PULASKI COUNTY, ARKANSAS; PATRICIA TEDFORD, TREASURER, PULASKI COUNTY, ARKANSAS; PULASKI COUNTY, ARKANSAS; JOANN BOONE, TREASURER, CITY OF BENTON, ARKANSAS; THE CITY OF BENTON, ARKANSAS; AND ALL OTHER SIMILARLY SITUATED COUNTIES AND CITIES
RESPONDENTS

CITY OF FAYETTEVILLE, ARKANSAS
INTERVENOR

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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QUESTIONS PRESENTED

1. Are the members of the Petitioner-class of cable television operators and subscribers in Arkansas still having Sales Taxes unconstitutionally imposed upon their respective sales and purchases of cable television services; when the provisions of the First Amendment have been held by the highest appellate courts of some of Arkansas' sister states to prohibit such excise taxes from being imposed upon the charges for the sale of goods or services when the statutory schemes for imposing Sales and Use Taxes in those states treat the electronic and print segments of the mass communications media differently?

2. What are the First Amendment standards to be applied to the rights of cable television operators and subscribers, when compared to the standards already established by this Court to protect the First Amendment rights of those engaged in other businesses involved in both the electronic and print segments of the mass communications media?

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Petitioners are cable television operators and subscribers who are representatives of a certified class of taxpayers that are subjected to the state and local Sales Taxes imposed by Act 188 of 1987, as amended by Act 769 of 1989, and include the following named Plaintiffs:

Petitioner Daniel L. Medlock is an individual, a subscriber to cable television services, and a resident of Little Rock, Pulaski County, Arkansas.

Petitioner Community Communications Company is an independent corporation that has no subsidiaries or affiliates, and which operates six cable television franchises in south and southeast Arkansas.

Petitioner Arkansas Cable Television Association, Inc. (ACTA) is an independent not-for-profit corporation that has no subsidiaries or affiliates, and is a trade organization composed of the operators of approximately 80 cable television systems in Arkansas.

Respondents are state or local officials of governmental entities wherein a Sales Tax is imposed and who are defendants in their official capacities, as follows:

Respondent James C. Pledger is the former Commissioner of Revenues of the Revenue Division of the Arkansas Department of Finance and Administration and the person who is charged by statute with administering the state and local Sales Taxes imposed in Arkansas.

Respondent Jimmie Lou Fisher is the Treasurer of the State of Arkansas and the person who is charged with disbursing funds to state agencies and to county and municipal governmental entities.

Respondents Donald Venhaus and Patricia Tedford are, or were, the County Judge and Treasurer, respectively, of Pulaski County, Arkansas, a county wherein a countywide local Sales Tax is imposed.

Respondent Joann Boone is the Treasurer of the City of Benton, Arkansas, a municipality wherein a local municipal Sales Tax is imposed.

Respondent City of Fayetteville, Arkansas, an intervenor, is a municipal corporation wherein a local municipal Sales Tax is imposed.

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CITY OF FAYETTEVILLE, ARKANSAS
INTERVENOR

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Daniel L. Medlock, et. al., respectfully petition for a Writ of Certiorari to review the judgment of the Supreme Court of Arkansas in this case.

OPINIONS

The opinion of the Supreme Court of Arkansas (App. B, *infra*, 3a) is reported at 301 Ark. 483, 785 S.W.2d 202. The Order of the Supreme Court of Arkansas denying the petitions for rehearing is unreported (App. A, *infra*, 1a).

The opinion (App. D, *infra*, 1a) and Order and Judgment (App. C, *infra*, 9a) of Chancellor Lee A. Munson of the Pulaski County Chancery Court are unreported.

JURISDICTION

The judgment of the Supreme Court of Arkansas (App. B, *infra*, 3a) was rendered on February 28, 1990, and timely filed Petitions for Rehearing by both the Petitioners and the Respondents were filed and denied on April 2, 1990 (App. A, *infra*, 1a). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution:

Amendment 1. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Statutes:

Ark. Code Ann. § 26-52-301(3)(D), as amended, App. E, *infra*, 23a.

STATEMENT OF THE CASE

The State of Arkansas has imposed a Sales Tax since 1941 and has imposed a corresponding Compensating (Use) Tax since 1949. The sale or consumption of *all* tangible personal property is subject to either the Sales or Use Taxes, unless specifically exempted. However, there are only certain enumerated services that are subjected to the Sales Taxes, while no services are subjected to Arkansas' Compensating (Use) Taxes. Since 1981, countywide and citywide Sales and Use Taxes have been imposed, on a local option basis, upon the sale or consumption of the same items to which the state Sales or Use Taxes apply.

The Arkansas General Assembly adopted Act 188 of 1987 (App. G, *infra*, 28a), effective July 1, 1987. This Act imposed, for the first time, Arkansas' state and local Sales Taxes upon charges made by cable operators in return for providing cable television services to subscribers in the State of Arkansas. No amendment was made to Arkansas' Compensating (Use) Tax by Act 188 of 1987.

With regard to the sale of goods or services by businesses involved in the mass communications media in Arkansas, as of July 1, 1987, Arkansas' statutory scheme of Sales and Use Taxes imposed Sales Tax upon the sale of cable television service, and books and magazines sold over the counter (but not by subscription). The sale of newspapers and the sale of advertising in newspapers and on billboards were specifically exempted from the imposition of Arkansas' Sales and Use Taxes. Likewise, either by statutory exemption, administrative ruling, or because of this Court's decision in the case of *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 421 (1987), the sale of magazines by subscription (whether printed within or without the State of Arkansas) were exempted from the imposition of Arkansas' Sales and Use Taxes. The sale of "scrambled" satellite television broadcast programming to home dish-antenna owners for a subscription fee and the advertising sold to sponsor local wireless broadcast radio and

television services were simply not mentioned by Arkansas Sales and Use Tax Acts, and, therefore, were "excluded" from the tax basis for these two excise taxes.

In late May of 1987, before the Sales Taxes imposed by Act 188 became effective, Daniel L. Medlock, a cable television service subscriber; Community Communications Company, a cable television operator with six (6) franchised systems in Arkansas; and the Arkansas Cable Television Association, Inc. (ACTA), a trade organization composed of approximately 80 cable operators with cable systems in the State of Arkansas, instituted this class action suit in the Pulaski County Chancery Court to contest the constitutionality of the state and local Sales Taxes imposed upon the charges for cable television service by Act 188 of 1987. The Petitioners' complaint alleged that cable television services were singled out, among other businesses that were involved in both the print and electronic segments of the mass communications media, by the imposition of these state and local Sales Taxes. The Petitioners alleged that the adoption of Act 188 of 1987 violated (1) their First Amendment rights of free speech and free press, (2) their rights to equal protection of the laws under the Fourteenth Amendment to the United States Constitution, and (3) the Supremacy Clause of the U.S. Constitution, because Congress had preempted this area of the law by stating in the Cable Communications Policy Act of 1984 (47 U.S.C. § 542) that no state or local excise tax could discriminate against cable television service.

The Petitioners' suit was certified as a class action; the trial court Chancellor ordered that the challenged state and local Sales Taxes to be escrowed and that the state Revenue Division was enjoined to keep separate records so as to be able to identify the payors of the monthly collections of such Sales Taxes.

At the various pretrial evidentiary hearings and at the trial in this case, extensive testimony and documentary evidence was introduced regarding the operation of cable

television systems, the programming available and the programming choices made by cable operators, and how the various cable television services compared with similar services provided by both the print (newspaper and magazine) and wireless broadcast (radio and television) segments of the mass communications media.

In his decision entered on March 10, 1989, the trial court Chancellor made Findings of Fact and Conclusions of Law (App. D, *infra*, 11a). Therein he made specific findings that cable television was entitled to claim the First Amendment protected rights of free speech and free press. The Chancellor drew many analogies between cable television and the print segment of the mass communications media, including the constant or continuing exercise of editorial discretion by cable operators in making programming decisions. The Chancellor also found that cable system operators are cablecasting a retransmission of original works by others while some of the programming is actually originated by the cable television system operators or is programming produced specifically for cable television system distribution. The Chancellor specifically found (*infra*, 14a):

> 7. The "cable casting" by cable television operators provides Arkansans with a variety of programming which presents a mixture of news, information and entertainment. This programming seeks to provide a wide variety of topics and formats, including regular news and entertainment programming, public access channels, public announcements and electronic bulletin board.

The Chancellor also noted that the Petitioners' witnesses testified that they considered the totality of cable television programming to be the equivalent of an "electronic magazine." (App. D, *infra*, 14a)

In his Conclusions of Law, the Chancellor specifically found (App. D, *infra*, 17a):

> 2. Cable television operations are covered by the First Amendment to the Constitution of the United States. The First Amendment privileges apply to both the cable television systems operators and cable television subscribers' right to receive cable programming.

After citing and quoting with approval from this Court's decision in the case of *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, (1986), the Chancellor proposed the question to be decided as:

> This Court must determine the extent of First Amendment protected rights of cable television. (App. D, *infra*, 18a)

Thereafter, relying upon certain decisions for the United States Courts' of Appeal for the Seventh, Eighth and Tenth Circuits, the Chancellor upheld the constitutionality of Act 188's imposition of these Sales Taxes upon cable television services, principally because cable television was found to make a much greater utilization of the public rights-of-way than do businesses engaged in either (1) the other electronic segments or (2) the print segments of the mass communications media. The Chancellor held that the raising of revenues *was* a sufficiently compelling governmental interest to satisfy this Court's constitutional test for incidental effect upon First Amendment rights, and, therefore, the Petitioners' constitutional challenge to the Sales Taxes was held to have failed.

On March 13, 1989, the Chancellor entered judgment, dismissing the Petitioners' complaint, and releasing approximately $6.2 million of previously escrowed state and local Sales Taxes (App. C, *infra*, 9a).

On March 21, 1989, the Arkansas General Assembly adopted Act 769 of 1989 (App. H, *infra*, 30a) to amend the provisions of Act 188 of 1987 (which had by then been codified as Ark. Code Ann. § 26-52-301(3)(D) (App. E, *infra*, 23a), so as to

also extend these state and local Sales Taxes to certain charges made by out-of-state providers of "scrambled" satellite broadcast television subscription services supplied to Arkansas subscribers. However, Act 769 did not amend Arkansas' Compensating (Use) Tax statutes. Therefore, subscription fees charged for "scrambled" satellite television broadcast services to subscribers located in Arkansas are still not subject to Arkansas' Compensating (Use) Tax when they are paid by the Arkansas subscriber directly to the out-of-state provider. Under this 1989 amendment to the Arkansas Sales Tax Act, subscription fees for "scrambled" satellite services are subject to Arkansas' Sales Taxes only when they are paid to an in-state collecting agent, e.g. a local cable operator.

On appeal to the Arkansas Supreme Court, the Petitioners requested that court to find that the statutory scheme of Sales Tax imposition on business engaged in the mass communications media, even after its amendment by Act 769 of 1989, still unconstitutionally discriminated against cable television services. The Arkansas Supreme Court, in a decision entered on February 28, 1990 (App. B, *infra*, 3a), overturned the Pulaski County Chancery Court's determination and held that the imposition of the state and local Sales Taxes upon the cable television services by Act 188 of 1987 was unconstitutional, because these excise taxes violated the First Amendment rights of free speech and free press belonging to the Petitioners. The state Supreme Court specifically rejected the public rights-of-way analogy exception proferred by the State of Arkansas and adopted by the trial court Chancellor, mainly because the Petitioners paid a municipal franchise (i.e. rental) fee for the use for these public rights-of-way. However, the Supreme Court did not delineate in its opinion what it considered were the First Amendment protected rights that did apply to the cable television service. Instead, the Arkansas Supreme Court simply noted this Court's prior decision in *Preferred Communications*, *supra*, and approved by reference the discussion of such First Amendment rights by the District of Columbia Court of Appeals in *Quincy Cable TV, Inc. v. F.C.C.*, 768 F2d 1434 (C.A.D.C., 1985), *cert. denied*, 476 U.S. 1169 (1986). (App. B, *infra*, 6a).

Thereafter, the Arkansas Supreme Court very briefly mentioned and discussed four decisions of this Court dealing with the First Amendment protected provisions of free speech and free press, especially as they relate to state taxation. The Court then held that the state and local Sales Taxes in Arkansas imposed upon charges for cable television services by Act 188 of 1987 were unconstitutional for the period from July 1, 1987, through June 30, 1989, because these excise taxes were discriminatorily applied between mass communicators delivering substantially the same services. However, the Arkansas Supreme Court specifically refused to compare cable television's First Amendment rights to those businesses involved in the print segment of the mass communications media, and, therefore, refused to hold that these Sales Taxes were unconstitutional for periods after the amendment of the Sales Tax Act, effective July 1, 1989, by Act 769 of 1989.

Timely Petitions for Rehearing were filed on behalf of the State of Arkansas (arguing the applicability of the public rights-of-way analogy) and by the Petitioners (arguing both the ineffectiveness of the 1989 amendment to the Sales Tax law and the refusal of the Arkansas Supreme Court to treat cable television services and the print segments of the mass communications media as similarly situated taxpayers for purposes of applying this Court's First Amendment devised constitutional test). Both these Petitions for Rehearing were denied by the Supreme Court's order of April 2, 1990. (App. A, *infra*, 1a).

REASONS FOR GRANTING THE PETITION

The Petitioners submit that the two questions presented by this case establish that there is a conflict between the opinion here, by the Arkansas Supreme Court, and opinions by other state and federal appellate courts regarding the proper interpretation of the First Amendment, as it applies to both the electronic and print segments of the mass communications media. The answers to these questions can only be supplied by a ruling of this Court and they are of great national importance, not only in the administration of the Sales and Use Tax laws of the various states, but also in the very regulation and operation of cable television systems throughout the country.

The Petitioners acknowledge that the State of Arkansas has the power to impose a Sales Tax upon charges for cable television service. However, Arkansas' statutory scheme for imposing these Sales Taxes (like that of many of its sister states) does not impose these excise taxes equally upon all similarly situated and First Amendment protected businesses involved in the mass communications media. Thus, the Petitioners submit Arkansas' Sales Taxes cannot single them out when other similarly situated businesses engaged in both the electronic and print segments of the mass communications media are not taxed.

Forty-five states and the District of Columbia impose some sort of Sales Taxes (or other gross receipts based excise taxes) upon the sale of goods and services. Many thousands of local governmental entities impose local option Sales Taxes or gross receipts based service, telecommunications or amusement excise taxes. The Petitioners submit that at least half of the states and hundreds of these local governments impose some sort of gross receipts based excise tax upon the charges made for providing some level of cable television service. The amount of taxes in question in this case alone exceeds more than $4.0 million per year, and that figure must be multiplied many times in analyzing the amount of gross receipts based excise taxes raised from cable television services that are collected by governments with more populous venues than Arkansas.

Thus, the Petitioners believe that the federal constitutional questions presented here are of substantial national importance to those involved in the programming and operation of the cable television industry, to millions of cable television subscriber-taxpayers, and to a vast number of state and local governments. Therefore, these questions should be addressed by this Court to decide these important issues of federal constitutional law.

I. A CONFLICT EXISTS BETWEEN THE DECISION BY THE ARKANSAS SUPREME COURT IN THIS CASE AND SIMILAR DECISIONS OF OTHER STATE AND FEDERAL APPELLATE COURTS REGARDING THE FIRST AMENDMENT STANDARDS TO BE APPLIED TO CABLE TELEVISION AND THE DECISION OF THE ARKANSAS COURT IS ERRONEOUS.

The Appellants submit that there is a real conflict between the limited application here by the Arkansas Supreme Court of the First Amendment based standard or test enunciated by this Court in its decisions in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenues*, 460 U.S. 575 (1983) and *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221 (1987), and similar decisions by other state and federal appellate courts. Thus, for periods after July 1, 1989, [1] the Petitioners are still having their charges for cable television services unconstitutionally subjected to Arkansas' state and local Sales Taxes, when similarly situated taxpayers in other states with similar statutory schemes for Sales Taxes do not have to pay such excise taxes upon the same charges. The appellate courts of these other states have held, in light of taxpayers' First Amendment challenges, that a statutory scheme of Sales Tax that does not impose these taxes equally upon both the electronic segment and the print segment of the mass communications media violates the First Amendment. Also, the

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[1] The effective date of the amendment of Ark. Code Ann. §25-52-301(3)(D) by Act 769 of 1989.

vast majority of subscribers to "satellite" subscription television broadcast services in Arkansas are still not subject to Arkansas Sales Tax, even after the 1989 amendment to the statute.

a. *Conflict with Decisions of Other State Appellate Courts*

The Arkansas Supreme Court, in the instant case, held that "scrambled" broadcast television services sold on a monthly subscription fee basis were the *only* services of those involved in the mass communications media in Arkansas that were similar to those of cable television for First Amendment comparison purposes. The Arkansas Supreme Court refused to apply a broader measurement to determine *similarly situated* taxpayers for purposes of this First Amendment challenge, so as to include either (1) other businesses involved in the electronic segment or (2) businesses involved in the print segment of the mass communications media. Thus, the Arkansas Supreme Court has elected to very narrowly apply this Court's First Amendment test for state taxes that was mandated in the *Minneapolis Star* and *Arkansas Writer's Project* cases.

In two of Arkansas' sister states, Oklahoma and New York, the highest appellate courts of those states have very recently rendered decisions that broadly and generally apply the *Minneapolis Star* and *Arkansas Writer's Project* enunciated First Amendment standards to taxes imposed by their states that were discriminatorily imposed between businesses involved in the electronic segments and the print segments of the mass communications media. Those courts both held their state's statutory scheme of taxation to be unconstitutional because the businesses involved in the electronic segment were taxed differently than those

businesses involved in the print segment of the mass communications media. [2]

In both of these states, the taxing agencies maintained that businesses involved in the print segments and the electronic segments of the mass communications media were different; that the electronic segment of the mass communications media was susceptible to more government regulation; and that the differential taxation that resulted was a reasonable classification made by the respective state legislatures. In both instances, the Oklahoma and New York courts held that the "strict scrutiny" standard of the First Amendment, not the "rational basis" standard of the Fourteenth Amendment, applied to test the constitutionality of the challenged taxes, and that the burden was placed upon the states to show a compelling governmental interest that was served by the differential treatment of these businesses involved in the electronic and print segments of the mass communications media. In commenting upon the *Minneapolis Star* and *Arkansas Writer's Project* tests, in *Oklahoma Broadcasters Association*, the Oklahoma Supreme Court stated (789 P.2d at 1316):

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[2]See, *Oklahoma Broadcasters Association v. Oklahoma Tax Commission*, 789 P.2d 1312 (Okla., 1990), *Dow Jones & Co. v. Oklahoma Tax Commission*, 787 P.2d 843 (Okla., 1990), and *McGraw-Hill, Inc. v. State Tax Commission*, 541 N.Y.S.2d 252 (App. Div. 3 Dept., 1989), *affirmed and adopted*, 552 N.E.2d 163 (N.Y., 1990). It must be noted that the Oklahoma Supreme Court, in its *Dow Jones* opinion (787 P.2d at 846) specifically found that Arkansas' and Oklahoma's statutory schemes of Sales Taxes were sufficiently similar to enjoin the application of the *Arkansas Writer's Project* teaching to the Oklahoma Sales Tax laws. The Petitioners submit that the converse should also be true with regard to the rationale of these two Oklahoma Supreme Court decisions being equally applicable in this case. The Oklahoma Supreme Court specifically rejected the narrow or limited application of the First Amendment tests adopted by the Arkansas Supreme Court in this case by holding (787 P.2d at 846):

> [W]e find that the Court announced constitutional standards are meant for broad and general application to the press.

> Though both *cases* admittedly deal with differential treatment among members of the *print media*, there is nothing to suggest that this Court should, without sufficient justification, accrue preferential treatment of the print media over the broadcast media, where both are members of the press. The First Amendment guarantees freedom of the press—not just the *printed* press.
>
> These exemptions have resulted in differential treatment and are, therefore, subject to constitutional review. The test is whether the State can justify such differential treatment with a "counter balancing interest of compelling importance that it cannot achieve without differential taxation."

With regard to the Oklahoma Tax Commission's argument that differential taxation is permissible because the broadcasting media was subjected to a higher degree of regulation than the print media, [3] the Oklahoma Court held (789 P.2d at 1317):

> We find no merit to this argument. The cases cited by Appellant Tax Commission deal with *regulation* of the broadcast industry in that broadcast wavelengths represent a limited resource. No analogy can be drawn to the present challenge.

Likewise, in the differential treatment of advertising income for purposes of computing corporate franchise taxes, the intermediate New York Appellate Court held (541 N.Y.S.2d at 255):

> Given that there was differential treatment between the print media and the broadcast media in this case, it is incumbent upon Respondent to show that 20 NYCRR 4-4.3(f)(2) was necessary to serve a

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[3] This is exactly the same argument proffered by the Arkansas Revenue Division in the instant case regarding the greater utilization of public rights-of-way by the cable industry, which argument was rejected by the Arkansas Supreme Court.

> compelling State interest. This in our view it did not do. Respondent claims that the unique nature of the electronic media makes it more susceptible to governmental regulation and that there are many differences between the print and visual media. While this may be true, such an argument fails to show any compelling state interest in taxing the two types of media differently. Thus, the regulation must fall. . . . To conclude, we find, that the regulation at issue is unconstitutional under the 1st Amendment and grant the petition.

The Petitioners submit that either the highest or intermediate appellate courts of other states [4] have also more broadly applied this Court's *Minneapolis Star* and *Arkansas Writer's Project* standards in declaring state or local Sales Taxes (that are virtually the same as those imposed by the State of Arkansas in this case) and that the taxpayers in those states, like the subscriber-taxpayers to cable television services in the States of Oklahoma and New York, would not be subjected to the Sales Taxes that have been approved by the

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[4]See, *Newsweek, Inc. v. Celauro*, ____ S.W.2d ____, 1990 W.L. 61899 (TN., March 5, 1990); *Southern Living, Inc. v. Celauro*, ____ S.W.2d ____, 1990 61902 (TN., March 5, 1990); *Louisiana Life, Ltd. v. McNamara*, 504 S.2d 900 (La. App. 1st Div., 1987); *City of Alameda v. Premier Communications Network, Inc.*, 202 Cal. Rptr. 684 (Cal. App. 1 Dist., 1984), *cert. denied*, 469 U.S. 1073 (1984); and *Satellink of Chicago, Inc. v. City of Chicago*, 523 N.E.2d 13 (Ill. App. 1 Dist., 1988).

Arkansas Supreme Court in this case for all periods after July 1, 1989. [5]

b. *Conflict with Federal Decisions Regarding First Amendment Rights*

The Arkansas Supreme Court's refusal to broadly compare the First Amendment rights of cable television to those enjoyed by businesses involved in the print segment of the mass communications media is one that is at odds with decisions made by various federal courts of appeal and district courts that have previously addressed the question of the First Amendment rights enjoyed by cable television, especially in cases involving FCC regulation or franchising disputes. [6] The rationale set forth in the decision by the District of Columbia

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[5]The effective date for the amendment of Ark. Code Ann. § 26-52-301(3)(D) by Act 769 of 1989. This amendment was enacted after the decision was rendered by the trial court and while this case was on appeal. Therefore, the Petitioners have had no opportunity to present evidence to support their constitutional challenge upon the 1989 amendment to the Arkansas Sales Tax law. Notwithstanding, the Arkansas Supreme Court appears to have given prospective constitutional approval to Arkansas' statutory scheme for imposing Sales Tax, for periods after the 1989 amendment. On remand in this case (June 27, 1990), the Chancellor denied the Petitioners' Rule 15(d) A.R.C.P. motion to amend their complaint, in this action, to directly challenge the 1989 amendment. The State of Arkansas has indicated that it will argue *res judicata* or *collateral estoppel*, if these Petitioners institute a new and separate action to contest Arkansas' statutory scheme of Sales Taxes, for periods after the 1989 amendment. Therefore, the Petitioners' first question presented raises a legitimate and timely issue, even though the Petitioners succeeded in the Arkansas Supreme Court on their constitutional challenge for all periods prior to the 1989 amendment.

[6]See, *HBO v. FCC*, 567 F.2d 29 (C.A.D.C., 1977), *cert. denied*, 434 U.S. 839 (1977); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (C.A.D.C., 1985), *cert. denied*, 476 U.S. 1169 (1986); *Century Communications Corp. v. FCC*, 835 F.2d 292 (C.A.D.C., 1987), *cert. denied*, 108 S.Ct. 2014 (1988); *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (C.A.6, 1985), *affirmed and remanded*, 476 U.S. 488 (1986); *Century Federal, Inc. v. City of Palo Alto*, 710 F. Supp. 1559 (N.D. Cal., 1968); and *Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954 (N.D. Cal., 1987).

Court of Appeals in the *Quincy Cable TV* case is representative of the First Amendment analysis utilized by these federal courts [7] in applying this "balancing of interest" test. In that case, the federal appellate court held (768 F.2d at 1450):

> *While Miami Herald* involved the conventional press, as this Court had prior occasion to observe, there is no meaningful "distinction between cable television and newspapers on this point." *Home Box Office, Inc. v. FCC, supra*, 467 F.2d at 46.
>
> Indeed, once one has cleared the conceptual hurdle of recognizing that all forms of television need not be treated as a generic entity for purposes of First Amendment, the analogy to more traditional media is compelling. Two influential commissions have in fact reached precisely that conclusion. In the words of Cabinet Committee on Cable Communications, "[C]able development has the potential of creating an electronic media of communications more diverse, more pluralistic and more open, more like the print and film media than like our present broadcast system." . . . See also, *Sloan Commission on Cable Communications*, On the Cable 92 (1971) "Cable television by freeing television from the limitations of radiated electro-magnetic waves, creates . . . a situation more clearly analogous to that of the [print] press." (Citations omitted)

Though only the *Century Federal* case involved a First Amendment challenge to a state or local tax, all of these federal courts recognized that there was no logical reason to limit the comparison of First Amendment rights of cable television to only those of other electronic segments of the mass communications media. Instead, each of these courts applied the broader First Amendment standards or protections

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[7] All of these federal courts have applied the "strict scrutiny" or "balancing of interest" tests devised by this Court in *United States v. O'Brien*, 391 U.S. 367 (1968), which test was made applicable to First Amendment challenges to state taxes by this Court's decisions in *Minneapolis Star* and *Arkansas Writer's Project, supra*.

generally applicable to businesses involved in the print segment of the mass communications media. Apparently, the only reason the Arkansas Supreme Court refused to more broadly apply this Court's First Amendment mandated test for state taxes is because the Arkansas court found no specific decision by this Court that actually compared the print and electronic segments of the mass communications media (App. B, *infra*, 7a).

c. *The Arkansas Supreme Court's Approval of the Amended Statute is Erroneous.*

The Petitioners submit that the Arkansas Supreme Court's approval of the constitutionality of the statutory scheme of Sales Tax, after the 1989 amendment by Act 769 of 1989, is erroneous. This amendment is, in fact, illusory in having any effect of eliminating the unconstitutional discrimination that the Arkansas Court found actually existed for the two previous years under Act 188 of 1987. The only sales of "scrambled" satellite television broadcast subscription services that are now subjected to an excise tax in Arkansas are those that are paid by the subscribers-owners of Arkansas dish-antennas to collecting agents (*e.g.* cable operators) that are located within the State of Arkansas and who are merely local "collecting agents" for the out-of-state providers of such "scrambled" satellite services. However, if the subscription fee for the "scrambled" satellite service is paid by the Arkansas subscriber-taxpayer directly to the out-of-state provider (which is the situation in fully 80%-90% of the instances), then the sale is one that is completed in interstate commerce (*i.e.* at the place the payment is received by the out-of-state provider). Such sales cannot constitutionally be subjected to Arkansas' state and local Sales Taxes.[8] Such out-of-state purchases could constitutionally *only* be subjected to a Compensating (Use) Tax

[8]See this Court's decisions in *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944) (affirming a decision of the Arkansas Supreme Court that held that Arkansas' Sales Tax cannot apply to a purchase completed outside of the boundaries of the state); and *National Bellas Hess, Inc. v. Dept. of Revenue of Illinois*, 386 U.S. 753 (1967).

by the State of Arkansas. Act 769 of 1989 did *not* amend the Arkansas Compensating Tax Act (Ark. Code Ann. § 26-53-106, App. F, *infra*, 26a), so the purchase of such "scrambled" satellite services are still not subject to Arkansas' Compensating (Use) Tax.

Further, if the 10%-20% of the Arkansas based subscriber-taxpayers to "scrambled" satellite broadcast television services who now pay Arkansas' Sales Taxes (because of the passage of Act 769 of 1989) would simply change their method of payment from the *in-state* collecting agent, to make their payments *directly* to the *out-of-state* provider of such satellite services, the 1989 amendment to Arkansas' Sales Tax law would have absolutely no effect and the charges for their "scrambled" satellite services would be freed of any Arkansas excise tax. Thus, if all such subscribers to "scrambled" satellite services merely changed their method of payment, then exactly the same situation would exist (*i.e.* no tax on "scrambled" satellite services and Sales Tax on cable television services) which the Arkansas Supreme Court itself found violated the First Amendment rights of the Petitioners for the two year period from July 1, 1987, through June 30, 1989. Therefore, the Petitioners submit that the 1989 amendment to the Arkansas Sales Tax Act was without "practical substance" to address the constitutional infirmity that was found to exist in Arkansas' statutory scheme for imposing Sales Taxes.

Because of the three reasons outlined above, the Petitioners' First Amendment rights will continue to be violated by the imposition of Arkansas' Sales Taxes, while similarly situated subscriber-taxpayers of virtually the same services (in both Arkansas and these other states) will not be subjected to Sales or Use Taxes upon their purchase of cable or "scrambled" satellite services. This denial of constitutional rights must be cured by this Court's reversal of the Arkansas Supreme Court's decision in this case.

II. THE TIME HAS COME FOR THIS COURT TO DELINEATE THE FIRST AMENDMENT RIGHTS OF CABLE TELEVISION.

Cable television has now grown to the point where it is an equal, though distinctly separate, part of the overall mass communications media, along with wireless broadcast radio and television businesses and the print (newspaper and magazine) segment of the media. All of these mediums of communication transmit to their customer-subscriber-viewer-listeners a mix of news, information and entertainment. Each of the older more established segments of the mass communications media have had their First Amendment rights defined by numerous decisions of this Court. The Petitionrs submit that the time is now ripe for this Court to delineate the First Amendment rights of cable television in this case.

The instant case provides a fully developed evidentiary record that compares the functions, activities and programming of cable television with businesses involved in both the print segment and the other electronic segments of the mass communications media. The evidentiary record in this case establishes that there is integrated ownership of, and coordinated promotion of, both print and cable television businesses; that the exercise of editorial discretion in the choosing of programming by cable operators is virtually the same as that exercised by editors of newspapers or magazines; that there is unique programming and information generally available from cable television service that is not generally available from other businesses involved in the electronic or print segments of the mass communications media; and that cable service provides a variety of programming, through a

virtually unlimited number of channels, that causes its overall programming to be the equivalent of an "electronic magazine."[9]

Not only does cable television provide unique programming (*e.g.* the coverage of both the U.S. House of Representatives and the U.S. Senate on C-SPAN I and II) that is not readily available from other segments of the mass communications media, but the information and programming provided by certain of its specialized services is virtually the same as the information supplied by many businesses involved in the print segment of the mass communications media. For example, ESPN supplies coverage of athletic events that is virtually the same as that supplied by *Sports Illustrated* and *Sport* magazines; the information conveyed daily by the Financial News Network is the same as the information conveyed by *Fortune*, *Barrons* or *The Wall Street Journal*; while Cable News Network generally provides the same type of information as *Time*, *Newsweek* or *U.S. News & World Report*, and CNN Headline News provides information similar to that found in *USA Today* or any daily newspaper. In fact, taken as a whole, cable programming (which contains a rebroadcast or retransmission of original works by others, some advertising, and some original programming), provides virtually the same type of general information and entertainment as do general interest magazines, such as the *Reader's Digest*.

The cable television industry has grown from its infancy 40 years ago until it is now a fully developed, separate and

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[9]For commentators who make compelling arguments that cable television should be provided the same broad First Amendment protections afforded the print segment of the mass communications media, as opposed to the more restrictive First Amendment rights awarded the wireless broadcast segment of the mass communications media, see, Parsons, *Cable Television and the First Amendment*, Lexington Books (1987); Shapiro, Kurland & Mercurio, *Cable Speech: The Case for First Amendment Protection* (1983); Note, *Cable Television and the First Amendment*, 71 Col. L. Rev. 1008 (1971); and Note, *Cable Television and Content Regulation: The FCC, the First Amendment and the Electronic Newspaper*, 51 N.Y.U.L. Rev. 133 (1976).

distinct part of the mass communications medium that virtually every citizen of this country relies upon every day. Especially, in the last 20 years, cable television has developed from a passive receiver into a full fledged provider of programming that is much more diverse than can ever be supplied by any one or even a combination of wireless broadcast television networks. During this last 20 year period of time, the decisions of this Court which have dealt with the question of the regulation or control of cable television by the F.C.C. [10] have gone from an easy acceptance of the FCC's assertion of jurisdiction over the cable industry (as being ancillary to that agency's duty to regulate wireless broadcast radio and television), to one where this Court now appears ready to finally delineate the First Amendment rights and standards that are applicable to this new and separate medium of expression.

In 1984, Congress adopted the Cable Communications Policy Act, 47 U.S.C. § 521, *et seq.*, for the purpose of setting a national policy regarding this new segment of the mass communications media. Through this legislative action, Congress specifically stated that it was recognizing the First Amendment rights of both cable operators and cable subscribers. [11]

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[10]See, *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *Fortnightly Corp. v. United Artist Television, Inc.*, 392 U.S. 390 (1968); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974); *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979); *Capital Cities, Inc. v. Crisp*, 467 U.S. 691 (1984) and *City of Los Angeles v. Preferred Communications Corp.*, 476 U.S. 488 (1986). Also, the Petitioners note that, interspersed among these last three cited decisions, this Court has also refused to grant *certiorari* in decisions of the District of Columbia Court of Appeals that have struck down FCC regulation of cable television, on First Amendment grounds, in the cases of *HBO v. FCC, supra; Quincy Cable TV, Inc. v. FCC, supra;* and *Century Communications Corp. v. FCC, supra.*

[11]See, H. Rept. 98-934, 98th Cong. 2d Sess. (1984), U.S. Code & Admin. News, Vol. 5, p. 4655, at 4668. Also, the members of this Court should note that there are several pending Bills, *e.g.* S. 1880, 101 Cong., 1st. Sess., where some would seek to "reregulate" cable television. A comprehensive delineation of the First Amendment rights of cable television in this case could be of substantial guidance and benefit to the members of Congress as that address this important question.

In this Court's 1984 decision in *FCC v. League of Women Voters of California*, 468 U.S. 365 (1984), Justice Brennan noted (468 U.S. at 376-377, ftnt. 11):

> The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent chairman of the FCC, charged that with the advent of cable and satellite television technology, communities now have access to such a wide veriety of stations that the scarcity doctrine is obsolete. See, e.g. *Fowler & Brunner, A Marketplace Approach to Broadcast Regulation*, 60 Texas L. Rev. 207, 221-226 (1982). We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.

The Petitioners submit, if this Court finds that it is still not time to reexamine its longstanding approach regarding the regulation of the wireless broadcast industry, that the time *has come* for this Court to delineate the general First Amendment rights and standards applicable to cable television as the newest full and separate member of the mass communications media. To make a horticultural analogy, perhaps more rapidly than any other segment of our country's mass communications media, cable television has flowered from a mere bud to a mature blossom in only 20 years. Like other hybrids, this flower may have certain characteristics of its forebearers, but it is, indeed, a new variety that has earned and must be awarded its own separate classification in the mass communications genre.

By taking this opportunity to delineate such First Amendment guidelines, this Court would also give much needed guidance to not only the state courts with regard to matters of taxation, but also to the lower federal courts, which

seem to be in some conflict regarding cable television access or regulation. [12]

The Petitioners submit that it is now time for this Court to take this opportunity, as mentioned by Justice Blackmun in his concurring opinion in the *Preferred Communications* case (106 S.Ct. at 2038) so that—

> "The Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis."

In either instance, the Petitioners submit that the time is ripe for this Court to delineate the First Amendment rights of cable television operators and subscribers, and that the fully developed evidentiary record in this case will provide an excellent vehicle to exercise such an opportunity.

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[12]See the decisions of the District of Columbia Court of Appeals in *HBO v. FCC, supra; Quincy Cable TV, Inc. v. FCC, supra;* and *Century Communications Corp. v. FCC, supra,* and the Ninth Circuit in *Preferred Communications, Inc. v. City of Los Angeles,* 754 F.2d 1396 (C.A.9, 1985), *affirmed* and *remanded, City of Los Angeles v. Preferred Communications, Inc.,* 476 U.S. 488 (1986), as compared with the decisions of the Third Circuit in *Erie Telecommunications, Inc. v. City of Erie, Pa.,* 853 F.2d 1084 (C.A.3, 1988), the Seventh Circuit in *Chicago Cable Communications v. Chicago Cable Commission,* 879 F.2d 1540 (C.A.7, 1989) and *Omega Satellite Products, Co. v. Indianapolis,* 694 F.2d 119 (C.A.7, 1982); the Eighth Circuit in *Central Telecommunications, Inc. v. TCI Cablevision, Inc.,* 800 F.2d 711 (C.A.8, 1986); and the Tenth Circuit in *Community Communications, Inc. v. City of Boulder,* 660 F.2d 1370 (C.A.10, 1981). A settling of the apparent conflict over the First Amendment standards or limits, if any, applicable to the regulation of cable television would be of great benefit to the FCC, the thousands of franchising municipalities, and the businesses involved in the cable industry.

CONCLUSION

For the various reasons set forth above, this Petition for Certiorari to the Arkansas Supreme Court should be granted to answer the two questions presented by the Petitioners.

Respectfully submitted,

JUNE 29, 1990

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APPENDIX A

Office of The Clerk
Supreme Court of The State of Arkansas
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, AR 72201

April 2, 1990

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Re: 89-89 Daniel L. Medlock et al.
v. James C. Pledger, Commissioner
of Revenue et al.

Gentlemen:

The Supreme Court made the following order in the above styled case today:

> "Petitions for Rehearing are denied. Dudley and Price, JJ., not participating."

Sincerely yours,

LESLIE W. STEEN, CLERK

BY: Robin Horne

LWS:rh
cc: David P. Henry
Robert Parker
Frank J. Wills, III
James N. McCord, II
Larry Vaught
Alice Holcomb
(#87-2401)

APPENDIX B

SUPREME COURT OF ARKANSAS

No. 89-89

Opinion delivered: Feb. 28, 1990

DANIEL L. MEDLOCK, et al.

Appellants

v.

JAMES C. PLEDGER, et al.

Appellees

Appeal from Pulaski County Chancery Court (87-2401)

Honorable Lee A. Munson, Chancellor

Reversed and Remanded

DAVID NEWBERN, Associate Justice

The question in this case is whether the imposition of a sales tax on cable television service is an unconstitutional, and thus illegal, exaction because the tax does not apply to other mass communications media. We hold that, for a time, the tax was illegal because it was not levied on other, similar services, such as satellite television programming. Now that the tax has been made to apply to all similarly situated businesses, however, its illegality has been cured. We remand the case to the chancellor so that the taxes illegally collected may be refunded to those who paid them.

By Act 188 of 1987 the general assembly added to the services to be subject to the sales tax:

> Cable television services provided to subscribers or users. This shall include all service charges and

> rental charges whether for basic service or premium channels or other special service, and shall include installation and repair service charges and any other charges having any connection with the providing of cable television services.

By Act 769 of 1989, the language was changed to the following:

> Service of cable television, community antenna television, and any and all other distribution of television, video, or radio services with or without the use of wires provided to subscribers or paying customers or users, including all service charges and rental charges, whether for basic service, premium channels, or other special service, and including installation and repair service charges and any other charges having any connection with the providing of the said services.

Act 769 was signed by the governor on March 21, 1989, and in accordance with its emergency clause, became law on July 1, 1989. The act is now codified as Ark. Code Ann. § 26-52-301(3)(D)(i) (Supp. 1989).

Act 188 was promptly challenged by the appellants, Daniel L. Medlock, Community Communications Co., and the Arkansas Cable Television Association, Inc., on behalf of themselves and all other similarly situated taxpayers. The appellees are James C. Pledger, Commissioner of Revenues, and various state, county, and city officials, Pulaski County, the City of Benton, and all other similarly situated counties and cities. The City of Fayetteville intervened.

As Act 769 had not become law when the chancellor made his ruling, the sole question before him was the constitutionality of Act 188. The taxpayers challenged it as being in violation of their rights of freedom of speech and

freedom of the press guaranteed by the First Amendment, their right to equal privileges and immunities guaranteed by U.S. Const., art. 4, § 2, and Ark. Const. art. 2, § 18, and their right to equal protection of the laws guaranteed by the Fourteenth Amendment and Ark. Const. art. 2, § 3. They also claimed protection under 47 U.S.C. § 542 and the Supremacy Clause. All of the counts in the complaint boiled down to a claim of discrimination against the cable television medium, and that is the essence of the arguments on appeal, although they are segmented as was the complaint.

1. Public rights of way

In his order ruling against the taxpayers, the chancellor distinguished the cable medium from others on the ground that it required use of a public right of way in addition to the fact that there are no gross proceeds to be taxed in the case of, for example, broadcast television. There was uncontradicted testimony to the effect that a cable television enterprise pays a franchise fee for the use of the right of way. It is true that the use of public rights of way by cable television may subject it to more regulation as has been suggested in some cases. *See City of Los Angeles v. Preferred Communications, Inc.*, ____ U.S. ____, 106 S.Ct. 2034, 90 L.Ed. 480 (1986); *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 714 (8th Cir. 1986); *Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982); *Community Communications v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981). However, those cases involve regulation related to access to or use of the rights of way rather than a tax which has no relationship to the acquisition of the privilege of using public property. We thus find the fact that cable television uses public property and must obtain a franchise to do so should not control the result in this case.

2. The First Amendment

We need not indulge in a long explanation of the history of cable television and the cases which have gradually recognized the entitlement of such enterprises to First Amendment protection. A good discussion of it is found in *Quincy Cable TV, Inc. v. F.C.C.*, 768 F.2d 1434 (D.C. Cir. 1985).

The Supreme Court has left no doubt about the matter. In *City of Los Angeles v. Preferred Communications, Inc.*, *supra*, it was held that the complaint of a cable television company alleging violation of the company's rights guaranteed by the First Amendment should not have been dismissed for failure to state a claim upon which relief could be granted. The court made it clear that the complaint implicated the First Amendment and facts should be developed to determine how to balance the First Amendment protection to which a cable television company was entitled against the city's right to regulate the company's use of public property.

3. Discrimination.

Entitlement to protection under the First Amendment does not mean entitlement to absolute freedom from regulation by the government. *U.S. v. O'Brien*, 391 U.S. 367 (1968). If a tax is to be applied to an enterprise entitled to First Amendment protection, it must be a general tax and must not be a form of censorship. In *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), Louisiana was held to have violated the First Amendment by imposing a tax on newspapers circulating more than 20,000. The court recognized that the press may be subjected to taxation but not if the tax is discriminatory and functions as a censor of some newspapers but not others.

In *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), it was held that a

Minnesota use tax on ink and paper purchases over $100,000 was invalid because its impact was on a few newspapers and one in particular. Unlike the *Grosjean* case, there was no direct implication of censorship, but the tax was found to discriminate among newspapers and thus to be invalid. The Supreme Court again recognized, however, that the press is subject to a general, nondiscriminatory tax.

In *Arkansas Writers' Project v. Ragland*, ____ U.S. ____, 107 S.Ct. 1722, 95 L.Ed. 209 (1987), the Supreme Court held that a tax which was applied to some, but not other, magazines sold in Arkansas was in violation of the First Amendment.

In none of the cases we have discussed above, and in none of the other cases cited to us, do we find the Supreme Court holding that, for example, the failure to tax newspapers in the same manner as radio broadcasts violates the First Amendment. Each of the cases involved discrimination among competing mass communicators, each of whom was entitled to First Amendment protection. The taxpayers argue here that cable television is entitled to exemption from the sales tax because newspaper sales are not taxed and subscription magazine sales are not taxed. They would like us to issue a ruling which would invalidate not only Act 188 but, in effect, Act 769 as well. We decline to do so. As noted above, Act 769 was not before the court in this case, and we are unwilling to hold that all mass communications media must be taxed in the same way. It would be impossible to impose a tax which would have the same effect on broadcast television, the delivery of which produces no direct "gross proceeds," and cable television. We must, however, hold that a tax which discriminates between mass communicators delivering substantially the same service runs afoul of the First Amendment and the cases which prohibit discriminatory taxation among the purveyors of a particular medium.

Act 188 levied a tax on cable television enterprises but did not tax the proceeds resulting from the "unscrambling" of satellite signals. The similarity of the services is demonstrated in the testimony of Paul Gardner, Jr., president of the Arkansas Cable Television Association. He testified that his company offered both cable service and decoders for "unscrambling" satellite television broadcasts which a viewer using a satellite dish could not otherwise receive. He testified that his company charged the same to a cable viewer for the premium HBO channel, for example, as it charged a satellite viewer. Act 188 thus imposed a tax which cannot pass First Amendment muster, and we must remand this case to the chancellor for orders consistent with this opinion.

Reversed and remanded.

Dudley, J., not participating.

APPENDIX C

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS
FIRST DIVISION

DANIEL L. MEDLOCK, COMMUNITY COMMUNICATIONS COMPANY AND THE ARKANSAS CABLE TELEVISION ASSOCIATION, INC., on behalf of themselves and all other similarly situated taxpayers — PLAINTIFFS

vs. — No. 87-2401

JAMES C. PLEDGER, COMMISSIONER OF REVENUES; JIMMIE LOU FISHER, TREASURER OF THE STATE OF ARKANSAS; DONALD VENHAUS, COUNTY JUDGE, PULASKI COUNTY, ARKANSAS; PATRICIA TEDFORD, TREASURER, PULASKI COUNTY, ARKANSAS; PULASKI COUNTY, ARKANSAS; JOANN BOONE, TREASURER, CITY OF BENTON, ARKANSAS; THE CITY OF BENTON, ARKANSAS; and all other similarly situated counties and cities — DEFENDANTS

CITY OF FAYETTEVILLE, ARKANSAS — INTERVENOR

ORDER AND JUDGMENT

Based upon the Opinion containing this Court's findings of fact and conclusions of law entered in this cause on March 10, 1989, wherein this Court determined that Act 188 of 1987 [Ark. Code Ann. §26-52-301(3)(D)] is constitutionally valid, both facially and in its application, as

against the First Amendment and Equal Protection challenges of plaintiffs; and

Based upon the further findings by this Court that said law is a valid exercise of the State's police power and does not violate Article 2 Section 18 of the Arkansas Constitution or any provision of the Cable Communications Policy Act of 1984;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs' complaint be dismissed; that the Preliminary Injunction entered in this case on August 28, 1987 be and is hereby dissolved; that all funds previously required herein to be deposited into an interest-bearing escrow account now be released; and that all escrow requirements and other restrictions previously imposed herein against defendants be and are hereby dissolved and removed.

ENTERED this 13 day of March, 1989.

/s/ Lee A. Munson
Lee A. Munson
Chancellor

APPENDIX D

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS
FIRST DIVISION

DANIEL L. MEDLOCK, COMMUNITY COMMUNICATIONS COMPANY AND THE ARKANSAS CABLE TELEVISION ASSOCIATION, INC., on behalf of themselves and all other similarly situated taxpayers — PLAINTIFFS

vs. — No. 87-2401

JAMES C. PLEDGER, Commissioner of Revenues; JIMMIE LOU FISHER, Treasurer of the State of Arkansas; DONALD VENHAUS, County Judge, Pulaski County, Arkansas; PATRICIA TEDFORD, Treasurer, Pulaski County, Arkansas; PULASKI COUNTY, ARKANSAS; JOANN BOONE, Treasurer, City of Benton, Arkansas; THE CITY OF BENTON, ARKANSAS; and all other similarly situated counties and cities — DEFENDANTS

CITY OF FAYETTEVILLE, ARKANSAS — INTERVENOR

OPINION

From the evidence introduced at the hearing on plaintiff's motion for preliminary injunction, the evidence introduced at trial, as well as the arguments and authorities cited by the parties in their briefs, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52 (a) of the Arkansas Rules of Civil Procedure:

FINDINGS OF FACT

1. Plaintiffs in this action are Daniel L. Medlock, a citizen of Pulaski County, Arkansas, and a subscriber to cable television services. Community Communications Company, is an Arkansas corporation which operates 6 separate cable television systems in south Arkansas at Monticello, Warren, Arkansas City, Eudora, Tillar/Reed and East Camden. The Arkansas Cable Television Association, Inc. is a trade organization composed of 80 of the approximate 100 cable television system operators in the State of Arkansas.

2. The defendants are James C. Pledger, the Commissioner of Revenues and the person charged with collecting the state and local sales taxes in question each month from the individual cable operators. Jimmie Lou Fisher is the Treasurer of the State of Arkansas and is the person charged with receiving all collected state and local sales tax monies from the Commissioner of Revenues and then distributing such state sales taxes to the respective agencies under the Revenue Distribution Act and all local sales taxes to the respective counties and cities in the State of Arkansas wherein a local sales tax has been imposed. Donald Venhaus and Particia Tedford are, respectively, County Judge and Treasurer of Pulaski County, Arkansas. Pulaski County, Arkansas is one of approximately forty-two counties wherein a county wide local sales tax was imposed as of the time of trial. Joann Boone is the Treasurer of the City of Benton, Arkansas, and the City of Benton, Arkansas is one of approximately eighty municipalities within the State of Arkansas wherein a local municipal sales tax is imposed.

3. Testimony at trial established that there are approximately one hundred cable system operators providing cable television services in the State of Arkansas to approximately four hundred thousand separate

subscriber-customers. These systems vary in size from only a few one hundred subscriber-customers up to one system in Pulaski County, Arkansas with sixty-five thousand subscriber-customers.

4. These cable television system operators provide cable television service to their subscriber-customers in return for a monthly subscription fee. There are generally several levels of service provided, with additional charges being made by the operators for greater levels of service or what are generally referred to as "premium channels" or "pay channels."

5. The evidence at trial established that there are more programming services available to cable operators than can be carried on most cable systems in Arkansas. Witnesses who operated cable television systems in the State of Arkansas testified that they were constantly reviewing the choice of programming to be offered to their customer-subscribers. Specifically, Mr. Gardener, the owner and operator of Community Communications Company testified that in his six cable systems there was no exact uniformity of the programming offered. Instead, though each of his six cable systems offered some of the same programming, he chose to make some programming different in each system because of the particular interests of the individual subscribers in each of the systems.

6. Evidence introduced by plaintiffs' witnesses at the various hearings in this case has established that cable television system operators in the State of Arkansas make a variety of programming available to their subscriber-customers. Some of the programming is a retransmission of original works by others, while some of the programming is actually originated by the cable television system operator or is a cable casting of programming produced specifically for cable television system distribution in Arkansas.

7. The "cable casting" by cable television system operators provides Arkansans with a variety of programming which presents a mixture of news, information and entertainment. This programming seeks to provide a wide variety of topics and formats, including regular news and entertainment programming, public access channels, public announcements and electronic bulletin board.

8. The plaintiffs introduced a two-minute video tape of examples of programming produced exclusively for cable television distribution in the State of Arkansas. Such programming including agricultural service reports, policy commentary on the State Legislature's activities, industrial incentive programming and educational training, in addition to a variety of entertainment programming offered by cable television operators.

9. The owner-operators of two cable systems as well as the Executive Director of the Arkansas Cable Television Association, Inc. testified that they considered cable television programming to be the equivalent of "an electronic magazine".

10. The operator of one small system testified that his system even provided an electronic billboard service where his system's customer-subscribers could send messages (for example birthday greetings) to other customers of the same system. The operator of Community Communications Company testified that his cable systems generated some original programming. The company system at Warren, Arkansas cable cast the City Council and school board meetings, the local high school football games, and coverage of the Warren Pink Tomato Festival.

11. Since 1941, Arkansas has imposed a general sales tax upon the gross proceeds derived from the sale of all tangible personal property and from the sale of certain services. Ark. Code Ann. §26-52-101, et seq. Since late 1981,

Arkansas' counties and cities have been able to enact local option sales taxes that apply to the sales of the same goods and services as does the state sales tax. These local taxes may be imposed upon a county wide basis or only within the borders of one municipality. These local sales taxes are collected and administered by the Commissioner of Revenues in the same manner as he administers the State sales taxes. As of the time of trial, approximately forty-two counties and over eighty municipalities in Arkansas imposed these local sales taxes upon the sale of the same goods and services that are taxed by the State sales tax laws.

12. Mahlon Martin, the Director of the Arkansas Department of Finance and Administration, testified that the State of Arkansas had never prior to July 1, 1987 attempted to subject the charges made by cable operators to State and local sales taxes.

13. Act 188 of 1987 was signed into law by Governor Clinton on March 12, 1987, to be effective on July 1, 1987. Act 188 of 1987 [Ark. Code Ann. §26-52-301 (3) (D)] provides as follows:

> There is levied an excise tax of three percent (3%)
> upon the gross proceeds or gross receipts derived from all sales to any person of the following:
>
> (D) Service of cable television provided to subscribers or users including all service charges and rental charges, whether for basic service of premium channels or other special service, and including installation and repair service charges and any other charges having any connection with the providing of cable television services.

14. The Manager of the Sales & Use Tax Section of the Revenue Division testified that July 1, 1987 was the first time that the State of Arkansas had ever attempted to

impose the State and local sales taxes upon charges for cable television services.

15. On the passage of Act 188 of 1987, the Revenue Division of the Arkansas Department of Finance and Administration notified all cable television system operators in the State of Arkansas that they would have to register with the Sales & Use Tax Section, secure Sales Tax Permit Numbers, and begin to collect and remit the applicable state and local sales taxes imposed in their respective communities on cable television services provided on or after July 1, 1987. One cable television system operator testified that his company acted as a collecting agent for scrambled satellite television broadcast system charges in his area. The owner of Community Communications Company testified that his company also acted as collecting agent for scrambled satellite broadcast services in his area and that he invoiced his customer-subscribers for both cable television system services and scrambled satellite television broadcast services approximately the same amount each month. This operator testified that he applied the state and local sales taxes only to the charges made to the delivery of services by his cable system, while not applying the tax to the charges made by his company for delivery of television services by scrambled satellite television broadcast directly to the subscriber-customer's own "earth station".

16. Cable television enjoys universal access to the homes of subscriber-customers and requires use of public ways for provision, maintenance and repairing of its property and services. *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Circuit 1986).

CONCLUSIONS OF LAW

1. The Court has subject matter jurisdiction over this controversy pursuant to the provisions of Article 16, Section 13 of the Arkansas State Constitution. The Court

also has personal jurisdiction over each of the parties to this case.

2. Cable television operations are covered by the First Amendment to the Constitution of the United States. The First Amendment privileges apply to both the cable television system operators and to the cable television system subscriber's right to receive cable programming.

3. Though the United States Supreme Court has not specifically ruled upon the extent of First Amendment Protective Rights afforded to cable television, the Court in the case of *City of Los Angeles v. Preferred Communications, Inc.*, 474 U.S. ____, 106 S.Ct. 2034 (1986), recognized that cablecasting is to be afforded First Amendment protected rights. There, in a case involving the cable operators attack upon the City of Los Angeles' refusal to grant it a non-exclusive franchise to operate, the Supreme Court held:

> We do think that the activities in which respondent allegedly seeks to engage plainly implicate First Amendment interests. Respondent alleges:
>
> > The business of cable television, like that of newspapers and magazines, is to provide its subscribers with a mixture of news, information and entertainment. As do newspapers, cable television companies use a portion of their available space to reprint (or retransmit) the communication of others, while at the same time providing some original content. App. 3A
>
> Thus, through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, respondent seeks to communicate messages on a wide variety of topics and in a wide variety of formats. We recently

noted that cable operators exercise a "significant amount of editorial discretion regarding what their programming will include." *FCC v. Midwest Video Corp.*, 440 U.S. 698, 707, 99 S.Ct. 1435, 1445 (1979). Cable television partakes of some of the aspects of speech and the communication of ideas as to the traditional enterprises of newspapers and book publishers, public speakers, and pamphleteers. Respondent's proposed activities would seem to implicate First Amendment interests as do the activities of wireless broadcasters, which were found to fall within the ambit of the First Amendment in *Red Lion Broadcasting Co. v. FCC, supra*, 395 U.S., at 386, 89 S.Ct. 1804, even though free speech aspects of the wireless broadcasters' claim were found to be outweighed by the government interest in regulating by reason of the scarcity of frequencies.

4. This Court must determine the extent of First Amendment Protected Rights of cable television. The First Amendment provides that "Congress shall make no laws . . . abridging the freedom of speech . . . or the press". The United States Supreme Court, in the case of *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241, 49 S.Ct. 2831 (1974), held that the State of Florida could not pass a law requiring a newspaper to provide, free of cost, space for rebuttal by a political candidate that had been denounced by the newspaper in an editorial. The Supreme Court recently ruled, in the case of *City of Lakewood v. Plain Dealer Publishing Company*, 108 S.Ct. 2138 (1988) that a city, by ordinance, could not ban the newspapers' right to place coin operated distribution boxes upon the streets of the city simply because such racks or boxes interfered with the aesthetic qualities of the city's neighborhoods.

5. Early on in the development of the wireless broadcast of radio and television, the Courts established that both of these mediums were entitled to claim First Amendment Protected Rights. However, even though they

enjoyed First Amendment Protections, the Supreme Court ruled that access to these mediums could be controlled in spite of the First Amendment protected guarantees because governmental interests were served by the allocation of a limited number of broadcast frequencies that are technically available.

6. Based upon the evidence submitted in this case and upon decisions of Federal Courts interpreting the extent of First Amendment Protected Rights to be afforded cable television system operations, the Court must conclude that cable television system operators and subscribers are not entitled to claim the broader First Amendment Protected Rights afforded to the print media. The Eighth Circuit Court of Appeals in *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 Fed. 2nd 711 (8th Circuit 1986), determined that more governmental regulation of the cable medium may be permissible because, among other things, cable requires use of public ways and enjoys universal access to the home. The Court relied for its decision upon the United States Supreme Court's opinion in *Los Angeles v. Preferred Communications, Community Communications v. City of Boulder*, 660 F.2nd 1370 (10th Circuit 1981), and *Omega Satellite Products v. City of Indianapolis*, 694 F. 2nd 119 (7th Circuit 1982). The Eighth Circuit in *Central Telecommunications, Inc.* also determined that different communications media can be treated differently for First Amendment purposes.

7. Unquestionably, a State may subject any business entity that is afforded First Amendment Protected Rights to taxes imposed by the State. However, similarly situated entities must be treated the same. The Court finds that cable television programming requires a cable systems use of public property, which along with the distinct and unique benefits gained by cable from use of that property, distinguishes for constitutional purposes cable television from other communications media. The same is true in comparing cable television to wireless television or radio

broadcasting, in addition to the fact that there are no "gross receipts or gross proceeds" generated by wireless television or radio broadcasting on which the State sales tax could be imposed.

8. In the case of *Arkansas Writers' Project, Inc. v. Ragland*, 107 S.Ct. 36 (1987) the United States Supreme Court was faced with the question of the discriminatory applicability of Arkansas' sales tax. There, because the proceeds realized from the sale of certain magazines of a special content were exempted from Arkansas' sales tax, while other general interest magazines were subjected to the sales tax, the Supreme Court specifically held:

> "The Arkansas sales tax cannot be characterized as nondiscriminatory because it is not evenly applied to all magazines."

In that case, the Supreme Court held that the general sales tax was discriminatory because it was targeted at only a small group of magazines. Such case does not adversely affect the tax at issue in the present case. Arkansas' general sales tax is evenly applied to all cable television services and operations and is content-neutral. No small group of cable television operators is targeted by the tax. The same factual considerations make the specific ruling in *Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenues*, 103 S.Ct. 1365 (1983) inapplicable to the facts of the present case. No "special" tax is involved in the case at bar, nor does the tax operate unevenly on cable television operators or services. The extension of Arkansas' general sales tax to charges for cable television service was not an attempt to single out a business entity claiming First Amendment protected rights. The general sales tax applies to sales of tangible personal property and a variety of sales of services.

9. The case of *U.S. v. O'Brien*, 391 U.S. 367 (1968) establishes the test for determining whether governmental

regulation is sufficiently justified under the First Amendment. The Court there held that:

> 1. The regulation must be within the constitutional power of the government;
> 2. The regulation must further an important or substantial interest;
> 3. The regulation must be unrelated to suppression of free expression;
> 4. Any incidental restriction of First Amendment Freedoms must be no greater than necessary to furtherance of the governmental interest.

The raising of revenue is an important or substantial governmental interest. It has never even been argued that the tax on sales of cable television service is suppressive of free expression. It has never been questioned that the power to tax is within the constitutional power of the government. Finally, the tax on sales of cable television service goes no further than is necessary to achieve the important or substantial governmental interest.

10. Based upon the evidence presented in this case and the applicable law, this Court finds that the plaintiffs challenge is not well taken and should be denied. The statutory scheme of state and local sales taxation at issue does not discriminatorily apply the sales tax, nor is there any "facial" discrimination.

11. Because the Court has decided that the challenged sales taxes are constitutionally valid, the Court dismisses plaintiffs' First Amendment claims. The plaintiffs' Equal Protection claims are also denied, because the sales tax is rationally related to a legitimate governmental interest. That is the test prescribed by *Streight v. Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983), and the test has been passed in this case.

Entered this 10 day of March, 1989.

/s/ Lee A. Munson

Lee A. Munson
Chancellor

APPENDIX E

Selected Portions of the Arkansas Gross Receipts [Sales] Tax Act of 1941 (as in effect on January 1, 1990)

26-52-101. Title

This act shall be known and cited as the "Arkansas Gross Receipts Act of 1941."

* * *

26-52-301. Tax Levied.

There is levied an excise tax of three percent (3%) upon the gross proceeds or gross receipts derived from all sales to any person of the following:

(1) Tangible personal property;

(2) Natural or artificial gas, electricity, water, ice, steam, or any other utility or public service except transportation services, sewer services, and sanitation or garbage collection services;

(3) (A) (i) Service by telephone, telecommunications, and telegraph companies to subscribers or users, including transmission of messages or images, whether local or long distance.

* * *

(B) Service of furnishing rooms by hotels, apartment hotels, lodging houses and tourist camps or courts to transient guests; the term "transient guests" being defined for the purpose hereof as those who rent accommodations other than their regular place of abode on less than a month-to-month basis.

(C) (i) Service of alteration, addition, cleaning, refinishing, replacement, and repair of motor vehicles, aircraft, farm machinery and implements, motors of all kinds, tires and batteries, boats, electrical appliances and devices, furniture, rugs, upholstery, household appliances, television and radio, jewelry, watches and clocks, engineering instruments, medical and surgical instruments, machinery of all kinds, bicycles, office machines and equipment, shoes, tin and sheetmetal, mechanical tools, and shop equipment.

* * *

[Subparagraph (D) below is as amended by Act 188 of 1987 and effective for periods from July 1, 1987, through June 30, 1989.]

(D) Service of cable television provided to subscribers or users including all service charges and rental charges, whether for basic service or premium channels or other special service, and including installation and repair service charges and any other charges having any connection with the providing of cable television services.

[Subparagraph (D) below is as amended by Act 769 of 1989 and effective for periods after July 1, 1989.]

(D) (i) Service of cable television, community antenna television, and any and all other distribution of television, video, or radio services with or without the use of wires provided to subscribers or paying customers or users, including all service charges and rental charges, whether for basic service, premium channels, or other special service, and including installation and repair service charges and any other charges having any connection with the providing of the said services.

(ii) The tax levied by this section does not apply to services purchased by radio or television companies for use in providing their services.

(4) Printing of all kinds, types, and characters, including the service of overprinting, and photography of all kinds;

(5) Tickets or admissions to places of amusement; to athletic, entertainment, or recreational events; or fees for the privilege of having access to or the use of amusement, entertainment, athletic, or recreational facilities including free or complimentary passes and tickets, admissions, dues, or fees, with such free or complimentary passes, tickets, dues, or fees being declared to have a value equivalent to the sale price of tickets, passes, admissions, fees, or dues of like kind or character.

* * *

26-52-401. Exemptions for various products and services.

There is specifically exempted from the tax imposed by this act the following:

* * *

(4) Gross receipts or gross proceeds derived from the sale of newspapers;

* * *

(13) Gross proceeds derived from sales of advertising space in newspapers and publications and billboard advertising services;

(14) Religious, professional, trade, and sports journals and publications printed and published within this state and sold through regular subscriptions;

* * *

APPENDIX F

Selected Portions of the Arkansas Compensating [Use] Tax Act of 1949 (as in effect on January 1, 1990)

26-53-101. Title.

The title of this subchapter shall be cited as the "Arkansas Compensating Tax Act of 1949."

* * *

26-53-106. Imposition and rate of tax generally - Presumptions.

(a) There is levied and there shall be collected from every person in this state a tax or excise for the privilege of storing, using, distributing, or consuming within this state any article of tangible personal property purchased for storage, use, distribution, or consumption in this state at the rate of three percent (3%) of the sales price of the property.

(b) This tax will not apply with respect to the storage, use, distribution, or consumption of any article of tangible personal property purchased, produced, or manufactured outside this state until the transportation of the article has finally come to rest within this state or until the article has become commingled with the general mass of property of this state.

(c) This tax shall apply to use, storage, distribution, or consumption of every article of tangible personal property, except as provided in this subchapter, irrespective of whether the article or similar articles are manufactured within the State of Arkansas or are available for purchase within the State of Arkansas and irrespective of any other condition.

(d) (1) For the purpose of the proper administration of this subchapter and to prevent evasion of the tax and the duty to collect the tax imposed in this section, it shall be presumed that tangible personal property sold by any vendor for delivery in this state or transportation to this state is sold for storage, use, distribution, or consumption in this state unless the vendor selling the tangible personal property has taken from the purchaser a certificate signed by and bearing the name and address of the purchaser to the effect that the property was purchased for resale.

(2) It is further presumed that tangible personal property shipped, mailed, expressed, transported, or brought to this state by the purchaser was purchased from a vendor for storage, use, distribution, or consumption in this state.

APPENDIX G

ACT 188 1987
A Bill

State of Arkansas
76th General Assembly
Regular Session, 1987
By: Representative Lipton HOUSE BILL 1784

For An Act To Be Entitled

"AN ACT TO AMEND SUBSECTION (c) OF SECTION 3 OF ACT 386 OF 1941, AS AMENDED, [ARK. STATS. ANN. §84-1903(c)] TO IMPOSE THE ARKANSAS GROSS RECEIPTS TAX UPON CABLE TELEVISION SERVICES; AND FOR OTHER PURPOSES."

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Subsection (c) of Section 3 of Act 386 of 1941, as amended, the same being Arkansas Statutes Ann. §84-1903(c) is hereby amended by adding the following paragraph (4) at the end thereof:

"(4) Cable television services provided to subscribers or users. This shall include all service charges and rental charges whether for basic service or premium channels or other special service, and shall include installation and repair service charges and any other charges having any connection with the providing of cable television services."

SECTION 2. All laws or parts of laws in conflict with this Act are hereby repealed.

SECTION 3. It is hereby found and determined by the General Assembly that the State of Arkansas is in serious

danger of losing revenues which are necessary to provide adequate funding for schools and other essential services required by the citizens of this State and the provisions of this Act are necessary to avoid a substantial reduction in State revenues. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health and safety shall be in full force and effect on and after July 1, 1987.

APPROVED BY /s/ Bill Clinton
GOVERNOR

3/12/87

APPENDIX H

ACT 769 1989
AS ENGROSSED 3/2/89

A Bill

State of Arkansas
77th General Assembly
Regular Session, 1989
By: Representative McGinnis HOUSE BILL 1800

For An Act To Be Entitled

"AN ACT TO AMEND SECTION 26-52-301(3) (D) OF THE ARKANSAS CODE OF 1987 ANNOTATED TO EXPAND THE APPLICATION OF THE GROSS RECEIPTS TAX TO ALL TELEVISION, VIDEO AND RADIO SERVICES PROVIDED TO SUBSCRIBERS AND CUSTOMERS; AND FOR OTHER PURPOSES."

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Section 26-52-301(3) (D) of the Arkansas Code of 1987 Annotated is hereby amended to read as follows:

"(D) Service of cable television, community antenna television and any and all other distribution of television, video or radio services with or without the use of wires provided to subscribers or paying customers or users, including all service charges and rental charges, whether for basic service, premium channels or other special service, and including installation and repair service charges and any other charges having any connection with the providing of the said services. *The tax levied by this section does not*

apply to services purchased by radio or television companies for use in providing their services."

SECTION 2. All provisions of this act of a general and permanent nature are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code Revision Commission shall incorporate the same in the Code.

SECTION 3. All laws and parts of laws in conflict with this Act are hereby repealed.

SECTION 4. It is hereby found and determined by the General Assembly that the State of Arkansas is in serious need of additional revenue for the purpose of funding critical education programs and other essential services required by the citizens of the state and the provisions of this act are necessary to raise needed revenue. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect on and after July 1, 1989.

/s/ B. McGinnis

APPROVED BY /s/ Bill Clinton
GOVERNOR

3-21-89